

***United States Court of Appeals
for the Second Circuit***

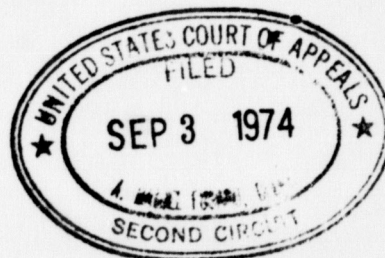


APPELLEE'S BRIEF

74-1803

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 74-1803
Calendar No. 207



CHARLES H. MOGULNICKI

Appellant,

vs.

STATE OF CONNECTICUT and
TROOPER ROBERT KELLER
SERGEANT MORTON DENNERSTEIN
Criminal Intelligence Division
State of Connecticut

Appellees.

Bp/s

APPELLEE'S BRIEF

On Appeal From The United States District Court
For The District of Connecticut

For Appellee State of Connecticut

Robert K. Killian
Attorney General

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Assistant Attorney General

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30 Trinity Street
Hartford, Connecticut 06115

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ISSUE

Where an action which is captioned as a petition for habeas corpus is substantially identical to a prior civil rights action brought by the same petitioner which had been dismissed, was not the District Court correct in denying the petition on the basis of res adjudicata?

STATEMENT OF THE CASE

This is an appeal from the denial and dismissal of a "petition for a writ of habeas corpus" on the grounds of res judicata.

The petition complained of a "warrantless arrest" [and] a warrantless search and seizure...." It referred to action of the Connecticut State Police in searching and arresting the plaintiff on December 4, 1967 for the crime of "pool selling" in violation of Sec. 53-295 of the Connecticut General Statutes. The petition was dismissed by the Hon. M. J. Blumenfeld, U.S.D.J., on the basis that the claims had been fully litigated in prior civil actions, Civ. Nos. 14,304 and 14,788. The principle of res judicata was cited.

The Appellee respectfully submits that the present appeal is but another step in a series of meritless legal maneuvers, the chronology of which is as follows.

Plaintiff was convicted of the criminal charges alleged in his petition in the Circuit Court of Connecticut for the 9th Circuit after a jury trial. He was sentenced to serve sixty (60) days in jail and pay a fine of \$200.00.

The Appellate Division of the Circuit Court upheld his conviction in State of Connecticut v. Mogulnicki, 6 Conn. Circ. Ct. 228, 270 A.2d 96 (1970). Certification was denied by the Connecticut Supreme Court in State of Connecticut v. Mogulnicki, 159 Conn. 627, 264 A.2d 364 (1970). The United States Supreme Court denied certiorari on October 12, 1970, 400 U.S. 826, and a petition for rehearing was also denied on November 16, 1970. 400 U.S. 920. The plaintiff served his jail sentence from December 16, 1970 to February 16, 1971.

The appellant filed a civil rights action against the State of Connecticut in the United States District Court for the District of Connecticut on March 15, 1971, alleging in substance the same claims of "warrantless" search and arrest as in the present case, Civ. Nos. 14,304. That action, together with a companion complaint against the State Police Troopers, was the one referred to by Judge Blumenfeld. A copy of the Complaint is included in the appendix, App., p. 2 a.

The Hon. T. Emmet Clarie, U.S.D.J., dismissed

the suit in a Ruling on Cross-Motions for summary judgment on the grounds of the applicable statute of limitations, Conn. Gen. Stat. §52-577. App., p. 4 a. The ruling was dated November 21, 1972 and filed the following day together with the Judgment. App., p. 7 a. Plaintiff then filed a motion "To Amend Judgment Under Rule 59 (E)" which in substance was a reallegation of his original complaint. It was denied on December 11, 1972, by Judge Clarie, whose endorsement was filed on December 13, 1972.

Mogulnicki then appealed to the United States Court of Appeals for the Second Circuit. The District Court judgment was affirmed on April 18, 1973, on the opinion of Judge Clarie. App., p. 8 a. Mogulnicki subsequently filed a petition for writ of certiorari which was denied by the United States Supreme Court on October 9, 1973. 94 S.Ct. 153.

It is further noted that Appellant has failed to comply with an order of the U. S. District Court and post a cash bond, and appellee intends to file a separate motion to dismiss on this basis.

Appellant failed to seek agreement from appellee as to the contents of the appendix or to serve the specified

designation as required by Rule 30(b), Federal Rules of Appellate Procedure. Accordingly, a separate appendix is submitted with this brief.

Appellee respectfully submits that this Court can judicially notice the court files in the civil rights suit, portions of which are included in the appendix. The suit arose in a federal district court in this circuit and was subsequently appealed to this Court.

Appellee is requesting the Clerk of the U. S. District Court for the District of Connecticut to forward the record in the civil rights suit, No. 14,304, to this Court for the purpose of this appeal.

ARGUMENT

Generally, the relationship of a civil rights action to a petition for writ of habeas corpus arises when the former is improperly utilized to avoid the exhaustion requirement. See, e.g., Preiser v. Rodriguez, ____ U.S. ____, 93 S.Ct. 1827 (1973). In the present case, however, the situation is reversed and the principle that is sought to be circumvented is that of res judicata. Appellant's brief in this case contains a prayer for damages. With the exception of its label, the petition itself is virtually identical to the prior civil rights suit.

"If a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release - the traditional purpose of habeas corpus. In the case of a damage claim, habeas corpus is not an appropriate or available federal remedy."

Preiser v. Rodriguez, supra, 93 S.Ct. at 1838.

It is true that the Preiser case arose in a different context; namely, circumvention of the exhaustion requirement of habeas corpus by resort to a civil rights

action. However, it is respectfully submitted that it is clear from Preiser that habeas corpus is not an available remedy in this case. For the purpose of res judicata, we are also concerned with substance, not form.

Wholly apart from this, the District Court's dismissal was correct because of the exhaustion requirement. See, e.g., Preiser v. Rodriguez, supra, 93 S.Ct. at 1836-1838. In addition, there is a serious question as to appellant's custody status, in that he had been released from confinement prior to filing the "petition," was not on any type of probation, and alleged no adverse collateral legal consequences which resulted from his misdemeanor conviction. See Preiser v. Rodriguez, supra, 93 S.Ct. at 1834; Sibron v. New York, 392 U.S. 40 (1968). Finally, it is recognized that habeas corpus is an extraordinary remedy to right a wrong, and not a routine procedure to search for error. Bernin v. Moore, 441 F.2d 395 (1st Cir. 1971). The petition is insufficient in that the mere fact that an arrest and search are warrantless does not automatically invalidate them. See Johnson v. United States, 333 U.S. 10 (1948); Henry v. United States, 361 U.S. 98 (1959).

* * * * *

For these reasons, it is respectfully submitted that the judgment of the District Court of Connecticut should be affirmed.

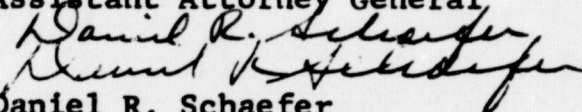
Dated at Hartford, Connecticut, this 29th day of August, A.D., 1974.

Respectfully submitted,

DEFENDANT - APPELLEE

By: ROBERT K. KILLIAN
ATTORNEY GENERAL

Barney Lapp
Assistant Attorney General


Daniel R. Schaefer
Assistant Attorney General

30 Trinity Street
Hartford, Connecticut 06115

His Attorneys

This is to certify that a copy of the above
Brief was mailed, via U. S. Mail, Postage Prepaid, this
29th day of August, 1974, to: Charles H. Mogulnicki,
11 High Street, Portland, Connecticut 06480.

Daniel R. Schaefer
Daniel R. Schaefer

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Assistant Attorney General

30 Trinity Street
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Telephone: 566-2203

APPENDIX

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Ruling on Cross-Motions for Summary Judgment, Civ. Action No. 14,304, Doc. No. 9	4a
Judgment, Civ. Action No. 14,304 Doc. 10	7a
Order of the United States Court of Appeals for the Second Circuit in No. 73-1010 affirming the judgment of the United States District Court for the District of Connecticut in Civ. Action No. 14,304	8a

RELEVANT DOCKET ENTRIES

- 1971
3/15 Complaint filed. Summons issued and together with copies of same and of complaint, handed to the Marshal for service.
- 11/22 Ruling on Cross-Motions for Summary Judgment entered. Ordered that the plaintiff's motion for summary judgment be, and hereby is denied; and that the defendant's cross-motion for summary judgment be, and hereby is granted; and the case is dismissed with taxable costs assessed against the plaintiff. Clarie, J. M-11/22/72. Copies mailed to Plaintiff and to Assistant Attorney General.
- " Judgment entered that this action be and is hereby dismissed, with costs to the defendant. Earl, C. Copies to Plaintiff and Assistant Attorney General. M-11/22/72.
- 11/28 Plaintiff's Motion to Amend Judgment Under Rule 59(E), filed.
- 12/11 Hearing on Plaintiff's Motion to Amend Judgment Under Rule 59(E). Court Exhibit A, filed. (Radio and Press Release of 1/15/71). Decision Reserved. Clarie, J. M-12/12/72.
- 12/13 Plaintiff's Motion to Amend Judgment Under Rule 59(E) endorsed as follows: "Plaintiff's Motion to Amend Judgment Under Rule 59(E) F.R.C.P. is denied." So Ordered. Clarie, J. M-12/13/72. Copies to Plaintiff and to Assistant Attorney General.
- 12/19 Notice of Appeal, filed by Plaintiff. Copies to Plaintiff and Attorney General.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
NEW HAVEN, CONN. 06505

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U. S. DISTRICT COURT
NEW HAVEN, CONN.

Charles H. Mogulnicki

vs

State Of Connecticut

14304

SUIT FOR DAMAGES IN AN ILLEGAL ARREST
ILLEGAL DETENTION AND PAYMENT OF AN
ILLEGAL FINE.

On Dec.4,1967 Trooper Keller and Sgt. Dennerstein of the Criminal Intelligence, State of Conn. made a warrantless arrest of the Plaintiff at his place of employment, Standard Knapp Division of Emhart, Main Street, Portland Conn, charged the plaintiff with the crime of "pool selling" and seized the sum of \$705.00 from a wallet on his person, without a search warrant.

Following the plaintiffs arrest and prior to entering a plea to the charge against him, the plaintiff moved to dismiss the information on the grounds that his arrest was illegal, in that same was effected without an arrest warrant in violation of the 4th thru the 14th Amendments of the United States Constitution. This motion to dismiss was denied by Judge Angelo G. Santaniello, July 5, 1968.

Suit for damages in the above case are invoked under the 4th thru the 14th Amendments to the United States Constitution and Due Process of Law.

- (1) The warrantless arrest of the Plaintiff was illegal and in violation of the 4th thru the 14th Amendment to the United States Constitution.
- (2) The warrantless search and seizure of the Plaintiffs person was illegal and in violation of the 4th Amendment of the United States Constitution.

On Dec.16,1970, Plaintiff was placed in detention at the Hartford State Jail to serve a (60)day sentence and pay a \$200.00 fine imposed upon him by Judge Eli Cramer of the 9th Circuit Court of Conn.

On Feb. 16, 1971, Plaintiff had served his entire jail sentence of (60) days and paid his fine upon release.

Plaintiff's claims for damages.

- (1) The Plaintiff, because of the illegal arrest was discharged from his employment from Standard Knapp Div. of Emhart on Dec. 5, 1967 and is unemployed to this date.
- (2) The Plaintiff was put in detention by the State of Connecticut at the Hartford State Jail on Dec. 16, 1970 to Feb. 16, 1971 illegally and without Due Process of Law, causing him extreme anguish and pain while in detention.
- (3) The Plaintiff, was made to pay an illegal fine to the State of Connecticut upon his release.

In conclusion, the plaintiff is seeking compensatory and punitive damages of \$250,000.00 from the State of Connecticut, because of the illegal arrest and the denial of Due Process of Law.

PLAINTIFF

Harold H. Wozniak
11 High St.
Scituate, Conn 06480

Dated March 15, 1971

Pro-Se Attorney For Plaintiff

915
Attorney General

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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U. S. DISTRICT COURT
NEW HAVEN, CONN.

CHARLES H. MOGULNICKI :

-vs-

:
: Civil Action No. 14304
:

STATE OF CONNECTICUT :

RULING ON CROSS-MOTIONS
FOR SUMMARY JUDGMENT

The plaintiff, Charles H. Mogulnicki, has moved for summary judgment pursuant to Rule 56, Fed. R. Civ. P., and the defendant, State of Connecticut, has similarly filed a cross-motion asking for summary judgment. The plaintiff filed this action in Court on March 15, 1971, against the State of Connecticut, claiming that he had been illegally arrested and detained without a warrant for the crime of "pool selling" and that \$705.00 was seized from his person coincidental with his arrest, for which no prior warrant or search warrant had been issued. The plaintiff alleges that his prosecution, conviction, and detention constituted a gross injustice to him under the fourth and fourteenth amendments to the United States Constitution.

He was found guilty of the charges in the State Circuit Court, after a jury trial, and the Court sentenced him to serve sixty (60) days in jail and pay a fine of \$200.00. The Appellate Division of the State Court found no error in his conviction, (6 Conn. Cir. Ct. 228) and

certification was denied by the Connecticut Supreme Court (159 Conn. 627). The United States Supreme Court denied certiorari (400 U.S. 826) and a petition for rehearing was denied (400 U.S. 920). He presently claims that his alleged illegal arrest caused him the loss of his job on December 5, 1967 and his continued unemployment to date. He also alleges that as a result of his conviction, he was required to serve his jail sentence and pay an illegal fine. He seeks money damages against the State in this Court of \$250,000.00. The Court finds that the action is without legal merit, grants summary judgment to the defendant and dismisses the action with taxable costs assessed against the plaintiff.

The State of Connecticut has defended against the action on several grounds, namely: (1) that the State is immune from suit; (2) that the statute of limitations bars the action, and (3) that the issues are res adjudicata by reason of the state court findings in the criminal proceedings. Any one of these defenses, if well founded, would conclude the action in favor of the defendant.

In weighing the inferences to be drawn, from the facts before the Court in any summary judgment proceeding, the underlying facts must be construed in a light most favorable to the party opposing the motion, in this instance, the plaintiff. (United States v. Diebold, Inc., 369 U.S. 654, 655 (1961)). The plaintiff's complaint alleges that

the conduct complained about occurred December 4, 1967, when he was arrested by State Troopers, Kelleher and Dennerstein, for a violation of state law. The present action was not filed in this Court until March 15, 1971, at 10:16 A.M., in the Court Clerk's Office, at New Haven.

The Connecticut statute of limitations, Conn. Gen. Stat. § 52-577, which governs this case, limits the period within which actions founded upon a civil wrong or tort may be commenced. It provides:

"No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."

Obviously, since on the face of the complaint, more than three years have elapsed, between the time when the incident complained about was sustained and the bringing of this action, the suit is barred by statute and must be dismissed.

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment be, and hereby is denied; and that the defendant's cross-motion for summary judgment be, and hereby is granted; and the case is dismissed with taxable costs assessed against the plaintiff.

Dated at Hartford, Connecticut, this 21st day of November, 1972.

T. Ernest Clarke
United States District Judge

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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U.S. DISTRICT COURT
NEW HAVEN, CONN.

CHARLES H. MOGULNICKI)
)
 v.)
)
 STATE OF CONNECTICUT)

CIVIL NO. 14,304

J U D G M E N T

This cause having come on for hearing on cross-motions for summary judgment filed by the parties and the Court having rendered its Ruling on Cross-Motions for Summary Judgment, under date of November 22, 1972, denying plaintiff's motion for summary judgment and granting defendant's cross-motion for summary judgment,

It is ORDERED and ADJUDGED that this action be and is hereby dismissed, with costs to the defendant.

Dated at New Haven, Connecticut, this 22nd day of
November, 1972.

GILBERT C. EARL

Clerk, United States District Court

By

James J. Connelley
Deputy In Charge

Attorney General

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NEW HAVEN

United States Court of Appeals

FOR THE
SECOND CIRCUIT

4/18/73

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U.S. DISTRICT COURT
NEW HAVEN, CONN.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at
the United States Courthouse in the City of New York, on the 18th day of
April one thousand nine hundred and seventy-three

Present:

HONORABLE TOM C. CLARK

HONORABLE STERRY R. WATERMAN

HONORABLE WILFRED FEINBERG

Circuit Judges.

CHARLES H. MOGULNICKI,

Appellant,

against-

STATE OF CONNECTICUT,

Appellee.



Appeal from the United States District Court for the
District of Connecticut

This cause came on to be heard on the transcript of record from the United States District Court
for the District of Connecticut, and was argued by ~~XXXXXX~~
appellant pro se, and by counsel for appellee.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that
the judgment of said District Court be and it hereby is
AFFIRMED on the opinion of Judge T. Emmet Clarie, dated November 21,
1972.

Tom C. Clark
Sterry R. Waterman
Wilfred Feinberg

(A true copy,

{ K. Lisa Funder Clerk

